A

PP

v.

SUNDARAJAN SOKALINGAM

B

HIGH COURT MALAYA, IPOH
TEO SAY ENG JC
[CRIMINAL APPEAL NO: M6-41-52-2009]
25 FEBRUARY 2011

C ***CRIMINAL LAW:*** *Sentence - Appeal against - Sentence of six months imprisonment against advocate and solicitor for aiding and abetting cheating by personation - Whether sentence inadequate - Seriousness of offence - Whether trial judge failed to take into account public interest - Penal Code, ss. 109 & 419*

D ***CRIMINAL PROCEDURE:*** *Adequacy of sentence - Sentence of six months imprisonment against advocate and solicitor for aiding and abetting cheating by personation - Whether trial judge erred in law and in fact - Whether sentence inadequate - Seriousness of offence - Whether trial judge failed to take into account public interest - Penal Code, ss. 109 & 419*

E

The accused, an advocate and solicitor, who had acted as a defence counsel in a robbery case for one Pathmanathan and Sulaiman, was charged under s. 419 to be read with s. 109 of the
F Penal Code for aiding and abetting one Thanigimani who had personated as the said Pathmanathan. The accused was convicted to six months imprisonment by the trial judge. The accused appealed against the conviction and sentence wherein it was eventually dismissed. The prosecution had cross appealed against
G the sentence wherein the issues raised were whether the trial judge had erred in fact and in law by (i) meting out a punishment which was grossly inadequate by failing to take into consideration the seriousness of the offence and punishment provided for under the law and (ii) failing to place public interest over and above the
H interest of the accused.

Held (dismissing the cross appeal):

(1) It is settled law that an appellate court should not interfere
I with the sentence meted out by the court below unless the court had erred in principle or the sentence was excessive or inadequate or not permitted by law. Any sentence passed must have been in accordance to law. (paras 10 & 13)

(2) The law prescribes a maximum sentence and it is left to the court to decide what is within that maximum, the appropriate sentence for each case. The trial judge had taken into account the right judicial principles when the custodial sentence was imposed instead of a fine since the accused was a legal practitioner and he should have discharged his duties honestly. (paras 19 & 24)

(3) In assessing the length of custodial sentence the court must bear in mind the public interest, gravity of the type of offence committed, facts in the commission of the offence, presence or absence of mitigating factors and the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. (para 25)

(4) Public interest is best served when the offender is punished for his wrong conduct and it has the effect of deterring the offender and other offenders from committing the same offence. The trial judge had considered the gravity of the offence committed by the accused in his capacity as a defence counsel. (paras 23 & 26)

(5) Consideration was also given to the fact that the accused would have to face the risk of being struck off from the roll, which would jeopardise the future prospect of his legal career. Thus, the imprisonment term of six months imposed was not manifestly inadequate since it was in line with the established judicial principles. (paras 27)

Case(s) referred to:

Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***

New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***

Ngian Chin Boon v. PP [1999] 1 SLR 119 ***(refd)***

PP v. Karthiselvam Vengatan [2009] 4 CLJ 632 CA ***(refd)***

PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***

PP v. Wong Kim Fatt [1991] 3 CLJ 2188; [1991] 3 CLJ (Rep) 620 HC ***(refd)***

R v. Ball [1981] 3 Cr App R (S) 283 CA ***(refd)***

R v. Kenneth John Ball [1951] 35 Cr Appeal 164 ***(refd)***

R v. Leo De Cruz [1935] MLJ 1 ***(refd)***

R v. Reeves 56 [1972] Cr App R 366 ***(refd)***

Rex v. Teo Cheng Lian And Rex v. Leck Kwee Ser [1949] 1 LNS 81 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(m)(2)
Penal Code, ss. 109, 408, 419

For the appellant - Laila Mohamed Nazil; DPP
For the respondent - M Stanislaus Vethanayagam; M/s Vethanayagam & Assoc

Reported by Kumitha Abdul Majid

JUDGMENT

Teo Say Eng JC:

[1] The respondent was charged before the Ipoh Magistrates' Court as follows:

> Bahawa Thanigimani a/l Subramaniam telah pada 27 September 2004 jam lebih kurang 10.30 pagi di dalam Mahkamah Sesyen No. 3 Ipoh, di dalam Daerah Kinta di dalam Negeri Perak Darul Ridzuan dengan memperkenalkan dirinya sebagai Patmanathan a/l Sivasamy telah menipu dirinya sebagai Patmanathan a/l Sivasamy telah menipu Puan Rasidah bt Hj. Chik seorang Hakim di Mahkamah Sesyen No. 3 Ipoh dengan mengaku kepada Hakim tersebut bahawa beliau adalah Patmanathan a/l Sivasamy sedangkan identity sebenar beliau adalah Thanigimani a/l Subramaniam (KPT No. 631212-08-5183) dan bahawa kamu telah bersubahat dengan Thanigimani a/l Subramaniam di dalam melakukan kesalahan menipu tersebut, yang mana kesalahan menipu tersebut dilakukan akibat dari persubahatan kamu dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 109 Kanun Keseksaan dan Seksyen 419 Kanun yang sama.

[2] At the end of the trial, the respondent was found guilty of the offence charged. He was convicted and sentenced to six months' imprisonment. He appealed against the conviction and sentence where the prosecution cross appealed against the sentence.

At the end of hearing the appeals, I dismissed the appeal by the accused (the appellant) against the conviction and sentence and also the cross appeal against sentence by the prosecution (the appellant).

[3] I shall now give reasons for my decision in dismissing the cross appeal against sentence by the prosecution. In this cross appeal against sentence by the prosecution, the prosecution shall be referred to as the appellant and the accused as the respondent.

[4] Brief Facts

4.1 The respondent was one Sundarajan a/l Sokalingam, the defence counsel acting for one Pathmanathan and Sulaiman Shaik Daud in a robbery case No: 62-33-03 before the Ipoh Sessions Court. In this case, four accused persons were charged, namely; Abdul Jaafar bin Abdul Mutalib, Ashraf bin Ali Ahmad Kadir, Sulaiman bin Shaik Daud and Pathmanathan a/l Sivasamy. The first two accused persons had been given a DNAA and the last two accused persons had been issued with a warrant of arrest.

4.2 When the case came up for mention on 27 September 2004 for Pathmanathan and Sulaiman bin Shaik Daud to answer for a warrant of arrest issued against them, the learned Sessions Court judge who presided over the case was one Puan Rashidah bte Hj Chik.

When the case was called at about 10.30am, one male Indian stood up from the public gallery and walked to the dock and admitted himself to be one Pathmanathan in case No. 62-33-03.

At the same time the respondent stood up at the bar table and told the court that Sulaiman bin Shaik Daud was on M.C and turned his head to the dock and told the court that Pathmanthan was present.

The learned Sessions Court judge realized that the 'accused' in the dock was not Pathmanathan and instructed the 'accused' through the interpreter to produce his identity card.

When the 'accused' told the court that he had left his identity card at home and when told to give his identity card number or his date of birth, he said that he could not remember his identity card number and also his date of birth. The Sessions Court judge then asked the 'accused' that is, the person in the dock whether he was Pathmanathan.

[5] Before the 'accused' could answer, the respondent stood up at the bar table and requested for a short adjournment. The court was then adjourned.

[6] About 15 minutes later the court resumed. The accused told the court that he instructed one Thanigimani to stand in for Pathmathan in case No. 62-33-03 since this case was called for the purpose of granting DNAA. The Sessions Court judge then instructed the prosecuting officer to lodge a police report against Thanigimani and the respondent.

[7] As a result of the lodging of the police report, Thanigimani was charged for cheating by personation under s. 419 of the Penal Code. He pleaded guilty and was convicted and sentenced to four months' imprisonment and fined RM8,000. On appeal to the High Court the imprisonment term against Thanigimani was set aside but the fine was enhanced to RM10,000. The respondent on the other hand was charged with aiding and abetting under s. 419 of the Penal Code to be read with s. 109 of the same Code. He claimed trial to the charge and was found guilty and was convicted at the end of the trial. He was then sentenced to six months' imprisonment. His plea in mitigation before sentence was as follows:

(a) In this charge Thanigimani was the principal offender and the respondent was charged for abetting and aiding Thanigimani. Thanigimani was convicted by the magistrate's court and sentenced to four months imprisonment and fine RM8,000. On appeal the imprisonment sentence was set aside, but the fine was enhanced to RM10,000.

It is the learned counsel's respectful submission that in a case involving a principal offender and an abettor, sentence on the one who abetted and aided cannot be higher than that of the principal offender.

(b) The respondent was 47 years old, currently practising as a lawyer and has been practising for 10-11 years. He's married with three children and schooling. He was 1st offender. Being in practice less than 12 years, representing various clients all over the country, appearing in advisory board and all over various courts in the country, he was an active practitioner in criminal law.

(c) The respondent graduated in UK and did his CLP here. This was an unfortunate incident. Throughout the past four years of the trial, there was initially extensive public coverage to that extent he has suffered public odium.

(d) The learned counsel's instruction was to plead for leniency of this court. The prosecution opted to charge him for abetment and the principal offencer was fined RM10,000. The sentence on this present accused should be less than that. I urge the court to impose lenient sentence. I will ask for stay.

The Punishment

[8] The maximum punishment provided for the offence of cheating by personation under s. 419 of the Penal Code is seven years imprisonment or with fine or with both. Whoever abets the offence shall if the offence abetted is committed in consequence of the abetment, be punished with the same punishment provided for the offence.

The Grounds Of Appeal

[9] The grounds of appeal against sentence may be summarized under two issues as follows:

(a) whether the learned Sessions Court judge had erred in fact and in law by meting out a punishment which is grossly inadequate by failing to take into consideration the seriousness of the offence and the punishment provided for under the law.

(b) whether the learned Sessions Court judge had erred in law and in fact in failing to place public interest over and above the interest of the respondent.

Principles Governing Appeals Against Sentence

[10] In regard to appeals against sentence it is settled law that an appellate court should not interfere with the sentence meted out by the court below unless the court below has erred in principles, that is to say, it gave undue weight to some of the evidence or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by law: see *R v. Leo De Cruz* [1935] MLJ 1; *Rex v. Teo Cheng Lian And Rex v. Leck Kwee Ser* [1949] 1 LNS 81; *PP v. Karthiselvam Vengatan* [2009] 4 CLJ 632.

[11] I shall now consider whether the sentence meted out by the learned Sessions Court judge was in line with the established principles governing appeal against sentence.

[12] The first ground of appeal was that the court below erred in passing a sentence which was manifestly inadequate because it failed to consider the seriousness of the offence and the punishment provided for the said offence.

[13] A sentencing court must first and foremost bear in mind that any sentence to be passed must be in accordance to law; see *PP v. Jafa Daud* [1981] 1 LNS 28 and section 173(m)(2) of the CPC.

[14] The phrase 'accordance to law' has been defined by the late Mohamed Azmi J (as he then was) as:

> that the sentence must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with the established judicial principles.

[15] Reverting back to our case, the punishment for cheating by personation is provided for under s. 419 of the Penal Code which reads;

> whoever cheats by personation shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

[16] The punishment provided for anyone who abets in committing the offence of cheating by personation is the same for the offence. In other words the present offence carries an option of a fine. In deciding whether or not to give a custodial sentence where a statute provides an option of a fine the sentencing court must bear in mind the following established principles relating to sentencing:

(a) where the offence involves a first offender, the general approach must always be to consider first if the offence can be dealt with appropriately by way of a financial penalty or some other non custodial option (eg, probation):

Ngian Chin Boon v. PP [1999] 1 SLR 119.

(b) It is wrong in principle for the sentencing court to impose a custodial sentence where the offender's means are such that it is unrealistic to expect him to pay a fine: *R v. Reeves* [1972] 56 Cr App R 366; *R v. Ball* [1981] 3 Cr App R (S) 283 CA; Evidence and Practice 2007.

(c) Nevertheless fines should not be imposed if an offender can easily pay up and regard the punishment with impunity. In such a case, custodial sentence is an appropriate remedy: *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606.

[17] The learned counsel for the respondent prayed for a non custodial sentence, that is to say, a fine on the ground that the principal offender who was charged with the principal offence of cheating by personation was initially sentenced to four months imprisonment and fine of RM8,000 but on appeal to the High Court the imprisonment term had been set aside and substituted with an enhanced fine of RM10,000. The learned counsel therefore submitted that in a case involving a principal offender and an abettor, sentence on the one who abetted and aided should not be higher than that of the principal offender.

[18] However the learned Sessions Court judge had taken the gravity of the offence committed by a legal practitioner into consideration in imposing a custodial sentence instead of a fine. It is to be noted that the learned Sessions Court judge had commented in her grounds of judgment that the respondent being a legal practitioner must discharge his duties honestly not only to the court and his client in particular but also to the society in general. By abetting and aiding his client in committing the offence of cheating by personation, he had not only tarnished the image of the judiciary but also jeopardised the confidence of the public in legal system in the country.

[19] I therefore find that the learned Sessions Court judge in imposing a custodial sentence instead of a fine under such circumstances had taken into account the right judicial principles.

[20] I shall now examine the 2nd ground of appeal that is whether the learned Sessions Court judge erred in law and in fact in failing to place public interest over and above the interest of the respondent when she imposed the six months' imprisonment term and whether the six months' imprisonment term imposed was manifestly inadequate.

[21] When passing sentence, the sentencing court will have to find a sentence which is appropriate for the offence for which the accused is charged.

[22] In deciding the appropriate sentence the sentencing court must be guided by the established principles of sentencing. The first and foremost is the public interest. In *R v. Kenneth John Ball* [1951] 35 Cr Appeal 164; Hilbery J had remarked:

> ... in deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to the honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[23] In other words, public interest is best served when the offender is punished for his wrong conduct and the punishment imposed must make it clear to the public at large that crime does not pay. It must have the effect of not only deterring the offender from committing offences in future but also deterring other offenders from committing the same offences.

[24] It is to be noted that our law usually prescribes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case.

[25] In assessing the length of custodial sentence the court must, bearing in mind the public interest, consider other factors, for instance, the gravity of the type of offence committed; the facts in the commission of the offence; the presence or absence of mitigating factors and the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy if any: see *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209.

[26] I find that in this case the learned Sessions Court judge had seriously considered the gravity of the offence committed by the respondent in his capacity as a defence counsel.

[27] I am also of the view that apart from the gravity of the offence the following factors must also be taken into consideration in deciding an appropriate sentence to be imposed:

(a) the consequences of the respondent conviction that is to say, the respondent would face the risks of being struck off from the Roll and would jeopardize the future prospect of his legal career.

(b) the sentences meted out on other similar comparable cases committed by legal practitioners. For instance, in *PP v. Wong Kim Fatt* [1991] 3 CLJ 2188; [1991] 3 CLJ (Rep) 620 the accused, a legal practitioner was charged for criminal breach of trust under s. 408 of the Penal Code. He was found guilty after a full trial and was convicted and sentenced to one year's imprisonment. In another case, that is, *PP v. Gooi Soon Seng*, the accused who was formerly a Deputy Public Prosecutor was charged under s. 12 of the PCA and was found guilty and convicted and was sentenced to one day's imprisonment and a fine of RM500.

Whereas in *PP v. Pang Ah Hee* the accused who was holding the post of Deputy Public Prosecutor, at the time of the commission of the offence was charged and convicted for an offence under the Official Secrets Act 1972 and was sentenced to six months' imprisonment and a fine of RM1,000. By way of comparison of the punishments meted out in the above three cases involving a legal practitioner and two other senior members of the Judicial Legal Service, it is my considered view that the imprisonment term of six months given by the learned Sessions Court judge was not manifestly inadequate.

[28] For the reasons adumbrated above, I find that the learned Sessions Court judge did not err in law and in fact when she imposed the imprisonment term of six months which was not manifestly inadequate and was in line with the established judicial principles.

[29] In the circumstances, I dismissed the cross appeal against the sentence by the prosecution.